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Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

NO. 988

FRANK PETZELT,

Petitioner,

vs.

JOSEPH T. LOCHEN, Administrator of the Estate of Theodore J. Mayer, Deceased,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI.

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CHAMPLIN-DONALY COMPANY, CHICAGO 1963

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ARGUMENT.

I.

THIS CASE PRESENTS NO QUESTION WORTHY OF CERTIORARI.

On the first trial of this cause, the jury's verdict in favor of the plaintiff below was set aside and a new trial granted. On the second trial of this cause, the District Judge, the Honorable Julius H. Miner, who died in March of this year,

set aside the jury's verdict in favor of the plaintiff below and entered a judgment notwithstanding the verdict for the petitioner.

To be sure, Judge Miner, having allowed petitioner's motion for judgment notwithstanding the verdict, did not rule upon petitioner's alternative motion for a new trial. But petitioner, having won his case outright in the District Court on his motion for judgment notwithstanding the verdict, made no motion or request, nor did he even suggest in the trial court that that court should rule upon his alternative motion for a new trial. And petitioner, thus having prevailed completely below, did not even suggest in the Court of Appeals that the District Court should have ruled upon his alternative motion until after that court had reversed the District Court's judgment.

Thus the instant case differs signally from *Montgomery Ward & Company* v. *Duncan*, 311 U. S. 243, in which this court did indeed hold that even though a Federal District Judge allows a motion for a judgment for the defendant notwithstanding the verdict, thus completely disposing of the case so far as the District Court is concerned, the court should also rule upon an alternative motion for a new trial.

But in the *Montgomery Ward* case a motion was made in the trial court requesting a ruling on the motion for new trial "in order to limit the issues on appeal" but the trial court *declined* to enter such an order.

Generally, a party cannot complain of a lower court's failure to rule upon a motion where no request for ruling is made even though the motion does appear in the files. The party who deems himself aggrieved by the absence of a ruling on a motion or an objection must request a ruling or the point is waived.

There is not the slightest doubt that if the petitioner had suggested to the District Court that it should rule upon his alternative motion for a new trial, that court would have ruled thereon. But the petitioner preferred to acquiesce in the trial court's silence upon this motion for new trial until the plaintiff had gone to the expense of an appeal after two verdicts in his favor. And now the plaintiff, Theodore Mayer, is deceased, having died in February of this year.

The petitioner would have the plaintiff's administrator try the case a third time, should his motion now be granted, with the prospect of a second appeal, when it would have been so easy for the defendant to have requested a ruling from the District Judge.

Had the defendant requested such a ruling and *had the District Court refused to accede to the request*, then, perhaps, granting of certiorari might be appropriate to compel compliance with this Court's opinion in the *Montgomery Ward* case.

But this case presents the antithesis of the factual situation occurring in the *Montgomery Ward* case.

It involves only a question of the Illinois substantive Law measuring liability of police officers for negligence. That law has been conclusively settled by the decisions of the Supreme and Appellate Courts of Illinois cited in the opinion of the Court of Appeals; *Karas* v. *Snell*, 11 Ill. 2d 233, 142 N. E. 2d 46; *Hood* v. *Brinson*, 30 Ill. App. 2d 498, 175 N. E. 2d 300; *Gacc* v. *City of Chicago*, 411 Ill. 146, 103 N. E. 2d 617.

Petitioner makes a point that the Court of Appeals erred because, so petitioner incorrectly says, that court based its judgment of reversal upon evidence which was tendered to the trial court but excluded and hence was not heard by the jury. But petitioner has simply misread the opinion of the Court of Appeals.

The evidence to which petitioner alludes was an offer of proof that the plaintiff and petitioner had had a previous altercation. This evidence was tendered upon the theory that the plaintiff reasonably feared violence at the hands of petitioner and so was not guilty of the contributory negligence with which petitioner charged him.

It is true that the Court of Appeals said, manifestly correctly, that this evidence should have been admitted.

But it is clear from a reading of the opinion of the Court of Appeals that it held (1) that a jury might reasonably have found, as in fact two juries have found, that petitioner frightened the plaintiff by needless menacing language, (2) that such conduct represents actionable negligence under Illinois law, and (3) that the elderly plaintiff was not guilty of contributory negligence in leaving his car and fleeing in fright into a dark and dangerous alley.

Nothing in this holding call for certiorari.

CONCLUSION.

For the reasons set forth in this brief, it is respectfully submitted that certiorari should be denied.

Respectfully submitted,

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